STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF WARREN,

Plantiff-Appellee,

vs. Case No. 2005-3758-AR

JOSEPH ANTHONY NYILOS,

Defendant-Appellant.
_____/

OPINION AND ORDER

Appellant (defendant) filed the instant claim of appeal on September 21, 2005, from a final judgment entered on September 9, 2005, in the 37th District Court, before the Hon. Norene S. Redmond. Defendant was convicted by jury of harassment/stalking on July 15, 2005, contrary to the City of Warren's Code of Ordinances, Ordinance No. 22-44.[1] Defendant was sentenced on September 9, 2005, to 45 days jail. The conviction stems from three incidents of stalking occurring in April of 2004. Appellant now appeals of right.

I

Defendant contends there are five issues for the Court's review. First, defendant contends there was insufficient evidence upon which to base a verdict of guilty. Second, that he was deprived of his right to a fair trial by the trial court's admission of other acts evidence. Third, that the jury instructions were legally insufficient and incorrect, thereby depriving defendant of his right to a fair trial and due process. Fourth, that the trial court abused its discretion in failing to admit a videotape offered into evidence by appellant, thereby depriving

[1] The judgment of sentence reads that appellant was convicted of violating MCL 750.411h. The parties agree appellant was charged and convicted of violating the equivalent Warren City Ordinance, at Sec. 22-44.

defendant of his right to a fair trial. Finally, defendant contends the trial court erred and violated his right to due process in failing to grant his request for an evidentiary hearing.

The People respond, first, that reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find every element of the crime of stalking beyond a reasonable doubt. Second, the People assert that it was not an abuse of discretion for the trial court to permit the introduction of other acts evidence relating to defendant's prior unconsented and unwanted contact with the victim. Third, the People aver the trial court's determination that there was probable cause to believe defendant was engaged in stalking the victim in April of 2004 was not wholly unjustified on the record. Fourth, the People maintain that in reading the jury instructions as a whole, the instructions fairly presented the issues to be tried, so that no abuse of discretion occurred. Finally, the People argue that, where the parties agree that a videotape showed the defendant and the victim engaged in consensual sexual activities, it was not an abuse of discretion to not play the videotape when the only dispute was when the sexual activity occurred, and the tape could not resolve that issue.

II

The Court will briefly set forth the pertinent undisputed facts in this case. Ordinance 22-44 prohibits stalking and harassment of another person; it parrots Michigan's stalking statute at MCL 750.411h. "Stalking" is defined in the ordinance as follows:

> *Stalking* means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Defendant was convicted of misdemeanor stalking, stemming from three incidents. Defendant had had no contact with the victim, either by phone or in person, from April of 2002 until March of 2004. (Tr 81) The first contact occurred on April 1, 2004. The victim was traveling on 13

Mile on her way home from work in the right lane. When traffic slowed, she moved into the left lane. When she approached Iroquois Street, she noticed another vehicle in the right turn lane, readying to turn right, but the vehicle continued straight instead of turning. The victim then attempted to return to the right lane, and noticed the vehicle was being driven by defendant. (Tr 82) Initially the victim thought the encounter could be just a coincidence because the street he was about to turn onto was a street that he had usually taken to go to his parent's house. (Tr 82) The victim thought "it was a coincidence and once he saw me he just couldn't resist stopping to stare at me." (Tr 83) The victim testified that, while she waited for a red light in the left lane, defendant stopped next to her and just stared at her for the duration of the light change. (Tr 84) Defendant then turned onto the next road at the right turn, and the victim continued straight on. (Tr 85)

The second incident occurred on April 19, 2004. The victim testified she was driving on 13 Mile Road, approaching Groesbeck. Again, she was driving home from work. The victim was in the left lane and saw defendant in the right lane. Again, she testified that she stopped for the traffic light, and defendant pulled his vehicle next to hers even though he had plenty of room to pull forward. (Tr 85-86) The victim testified that she thought defendant waved at her there. (Tr 87) After this incident, the victim went to the police and filed a report. (Tr 87)

The third incident occurred on April 23, 2004. Again, the victim testified that she was leaving work. The victim stated that there is a turnaround on Mound Road that sits directly across from the driveway that she pulls out of. Defendant was sitting in that turnaround. (Tr 88) The victim testified that when she pulled up to Mound about to get onto Mound Road, defendant waved his finger and his head at her as if to say no. (Tr 88) After this incident, the victim again filed a police report and obtained another personal protection order (PPO). (Tr 90)

III

Upon careful review, the Court is persuaded that reversal is mandated in this case based on the erroneous admission of other-acts evidence. In general, this Court reviews a trial court's decision regarding the admissibility of other acts evidence for an abuse of discretion. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). Questions of law are reviewed de novo. *Lukity*, 488.

Pursuant to MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Other acts evidence, however, may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]" MRE 404(b)(1). It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. The proponent must also explain how the evidence relates to the recited purposes. *Crawford*, 387.

Evidence of other acts may be admitted under MRE 404(b)(1) if: (1) the evidence is offered for a proper purpose, i.e., "something other than a character to conduct theory[,]" (2) the evidence is relevant under MRE 402, as enforced by MCR 104(b), "to an issue or fact of consequence at trial[,]" and (3) the probative value of the evidence is not substantially outweighed by its potential for undue prejudice under MRE 403. *VanderVliet, supra* at 74-75. With respect to the first two *VanderVliet* requirements, our Supreme Court in *People v Knox,* 469 Mich 502, 509; 674 NW2d 366 (2004), reviewing the law regarding MRE 404(b), stated:

> In *People v Crawford,* 458 Mich 376, 385; 582 NW2d 785 (1998), this Court explained that the prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford, supra* at 387. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded.

In *Crawford, supra* at 398, our Supreme Court discussed the heightened need for the careful application of the principles found in MRE 403 when determining the admissibility of other-acts evidence under MRE 404(b):

> Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In the context of prior bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." *People v Johnson,* 27 F3d 1186, 1193 (CA 6, 1994).

Here, with respect to the purposes for which the evidence was proffered, the People state the other acts evidence was admissible to show defendant's intent, the common scheme, plan, and system of defendant, and defendant's identity as to the perpetrator of the charged offenses. The People's primary argument is that defendant's conduct in April of 2004 was consistent with his continuous pattern of harassing the victim. The People maintain that while defendant's method changed, he sought to draw the victim's attention to him, which is similar and consistent with his prior conduct.

Defendant contends that the prior other acts were inadmissible outright. Specifically, defendant argues that the People presented in excess of 20 other acts evidence, from which one can only conclude that admissibility was premised on the doctrine of chances. However, defendant asserts, the doctrine of chances is not proper here, where, again, there is not a substantial degree of similarity to the acts charged.

The Court is persuaded there is not a sufficient similarity between the uncharged acts and the charged acts to establish that the former were admitted because they pertained to intent, scheme or identity. Rather, the Court believes that the uncharged acts were cumulatively admitted to show defendant's propensity to stalk.

With regard to identity, the Supreme Court has noted in *Crawford, supra*, that while the second sentence of Rule 404(b) refers to "identity" as a permissible use of uncharged misconduct evidence, "no one would suggest that Rule 404(b) permits the prosecutor to invite the jury to reach the conclusion of identity through an intermediate inference of character." *Crawford*, 392, n 9. That is, "[b]y parity urging of reasoning, the rule should be construed as prohibiting the prosecutor from urging the jury to reach that conclusion through an intermediate inference of the defendant's disposition of a certain mens rea. The better-reasoned cases require the prosecutor to reach the ultimate inference of mens rea without relying on an intermediate inference of character." *Crawford*, 392, n 9. The Court is not persuaded that in this case it was necessary to admit the other-acts evidence to establish identity.

Nor is the Court persuaded that the other-acts evidence was admissible to show intent/lack of accident. The Supreme Court has opined that the relationship between the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material. *People v Sabin*, 463 Mich 43, 69; 614 NW2d 888 (2000). The Supreme Court has thus found that where a defendant's theory of defense was *not* that the complainant mistakenly perceived his actions, but that the entire incident did not take place, evidence pertaining to a theory of absence of mistake is not relevant. *Id.*

Further, while the People assert that defendant's "other acts involved his foisting his presence on her," the Court is persuaded this is too tenuous to show a common scheme, plan, and

system of defendant—particularly in light of the two year hiatus during which the parties had no contact whatsoever. See *ante*, at 2. Admittedly, evidence of similar misconduct may be logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *Sabin*, *supra* at 63. The existence of a common plan, scheme, or system in doing an act is proper intermediate inference that is probative of whether the charged act was committed; the jury is not required to draw an inference regarding the defendant's character. *Sabin*, 64. The jury is simply asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred. The logical relevance of the evidence is based on the *system*, as shown through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act. *Sabin*, 64.

General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts. *Sabin*, 64. As the *Sabin* Court explained, citing from other sources:

> But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing intent. . . . The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a preexisting design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.
>
> The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.* *Sabin*, 64-65 (emphasis in original).

After careful consideration, the Court is persuaded that the charged acts do not contain a concurrence of common features that are naturally to be explained as caused by a general plan of which they are the individual manifestations. In this case, as stated, defendant was convicted of stalking after three incidences, two of which occurred when the victim happened upon defendant in traffic. In all three incidences, words were not exchanged, and defendant turned onto a side street rather than continue to follow the victim. The victim herself testified that she initially believed the first charged incident was a coincidence; the uncharged acts are only generally similar.[2] Comparing the prior other-acts with the charged acts, the Court is not left with the impression that the three charged acts were manifestations of an existing system or plan, especially in light of the intervening two-years without contact. Therefore, the Court believes the trial court abused its discretion in admitting the other-acts evidence.

Because the Court believes the other-acts evidence was improperly admitted, and reversal and remand is warranted on that basis alone, it need not address the sub-argument whether those other-acts evidence that were not noticed were properly admitted.[3]

IV

The Court will now consider defendant's argument that two jury instructions were improper. First, defendant contends the jury was insufficiently instructed as to the "intent"

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[2] For example, the victim testified that in the past the harassing behavior consisted of such things as coming to the victim's home and refusing to leave, on January 12, 2000; calling police for a welfare check on the victim in September of 2000, because he had been trying to call the victim and she would not speak with him; again appearing at the victim's house in the Fall of 2000 in the middle of the night, pounding on the door; returning to the victim's home that same night, being found on the porch by the police; making a third visit to the victim's home on the same day; having a pizza delivered to the victim's home, then calling her several times and appearing at her home, on April 4, 2001; on April 5, 2001, leaving flowers at the victim's placement of employment with a note, then calling her at home that night; driving through the parking lot on May 9, 2001, and looking at the victim and her friend; following the victim and her friend on May 10, 2001; pulling alongside her vehicle in the summer of 2001 and waving at her; approaching the victim at a Wendy's later that day; coming to the victim's home in January of 2002; and later that day, appearing at the victim's workplace, then following her in his vehicle.

[3] Since the Court finds reversible error pertaining to the other-acts evidence, neither does it reach the argument pertaining to insufficiency of the evidence.

element. Specifically, defendant argues that the use of the term "willful" in the ordinance demonstrates that it is a specific intent crime. The Court does not agree. Michigan courts construing the stalking law (MCL 750.411h, which, again, the subject ordinance duplicates) have decisively found that a plain reading of the statute demonstrates that the term "willful" modifies the "course of conduct" element. As the Court explained in *People v Hall*, unpublished opinion per curiam of the Court of Appeals, decided June 18, 1996 (Docket No. 180384), the legislative history of the statute illustrates that the Legislature did not intend stalking to be a specific intent crime. Slip op, 1. "[B]y defining stalking with reference to a willful and malicious course of conduct, the bill would ensure that an isolated incident of unwanted attentions or words of anger spoken in the heat of a moment did not constitute the proposed crime of stalking." *Hall*, slip op, 1. Further, while an earlier version of the bill contained language of specific intent, such language is missing from the statute as enacted. *Hall*, slip op, 1. Finally, the *Hall* Court noted that "the mere use of the term 'willful' in a statute does not automatically indicate that the codified crime is one of specific intent. See *People v. Todd,* 196 Mich App 357, 361; 492 NW2d 521 (1992)." *Hall*, slip op, 1. The Court finds the same analysis applies to the instant ordinance, i.e., "willful" modifies "course of conduct," and does not indicate stalking is a specific intent crime.

Next, defendant contends the trial court erred in giving an instruction pertaining to other-acts evidence. Where a defendant's trial counsel did not object to the challenged instruction at trial, the issue is not preserved for appeal. *People v McCrady,* 244 Mich App 27, 30; 624 NW2d 761 (2000). Unpreserved claims of error, whether constitutional or unconstitutional, are reviewed to determine whether plain error affected the defendant's substantial rights. *People v Carines,* 460 Mich 750, 766-767; 597 NW2d 130 (1999).

A trial court is required to instruct the jury concerning the law applicable to the case and to present the case fully and fairly to the jury in an understandable manner. MCL 768.29; *People v Henry,* 239 Mich App 140, 151; 607 NW2d 767 (1999). A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Rodriguez,* 463 Mich 466, 472; 620 NW2d 13 (2000). However, jury instructions should be considered in their entirety rather than extracted piecemeal to establish error. *Henry, supra*, 151. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Henry*, 151.

The trial court instructed as follows:

> You have heard evidence that was introduced to show that the defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show, number one, that the defendant had a reason to commit the crime.
>
> Number two, that the defendant specifically meant to stalk Jennifer Vogt.
>
> Number three, that the defendant acted purposefully, that is not by accident or mistake or because he misjudged the situation.
>
> And number four that the defendant uses a plan, system or characteristics scheme that he has used before or since. You must not consider this evidence for any other purpose.
>
> *For example, you must decide that it shows the defendant is a bad person or that he is likely to commit crimes.* You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty. (Emphasis added.) (Tr 277-278)

The Court is persuaded that there is no evidence that this one misstatement misled or confused the jury. Defendant relies upon case law providing that if a trial court gives a proper instruction, but subsequently gives an improper instruction, the Court must presume that the jury followed the improper instruction. *People v Shipp*, 68 Mich App 452, 456; 243 NW2d 18 (1976).

However, that case also clarified that there were no additional instructions given to repudiate the erroneous one in its case. *Shipp*, 456. The Court is persuaded that, considering the instructions in their entirety, there was no reversible error, the misspoken sentence notwithstanding.

V

Lastly, the Court considers defendant's argument that the trial court erred in not admitting the videotape showing defendant and the victim engaged in sexual intercourse. The admission of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Warren,* 228 Mich App 336, 341; 578 NW2d 692 (1998). The parties agree that the videotape depicts a sexual encounter between defendant and the victim, and is undated. The victim did not deny having had consensual sex with defendant. The only dispute was on what date the tape was made, the victim asserting it was on February 14, 2000, during an "on again" phase of the relationship, and defendant insisting it occurred on September 24, 2001, while a PPO was in effect. Defendant contends refusing to admit the tape was an abuse of discretion, because only part of the tape shows sexual activity. The rest of the tape, according to defendant, shows the victim's demeanor as calm and relaxed. Defendant contends the tape is the best evidence in rebutting the claim of constant fear and emotional distress claimed by the victim to be occasioned at the mere sight of defendant.

The Court does not agree that the trial court erred in excluding admission of the videotape. While defendant argues that *when* the videotape was made is irrelevant, since it shows the victim's reaction to him was not at all times one of fear, the Court does not find this reasoning persuasive. Certainly the victim could have been comfortable with defendant at one point in time and fearful at another. No one suggested the tape depicted anything other than consensual sex, and the jury could infer from that that the victim at one time felt comfortable

with defendant and was not in fear of him. Thus, lacking anything authenticating the date of its making, the Court does not believe the trial court erred in finding it unnecessary for the jury to witness the sex video.

VI

Based on the foregoing, it is hereby

ORDERED the final judgment entered on September 9, 2005, in the 37th District Court is REVERSED, and this case is REMANDED for further proceedings consistent with this Opinion. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* resolves the last pending claim and closes this case.

SO ORDERED.

DATED:

PETER J. MACERONI
CIRCUIT JUDGE

MAY 2 6 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

Peter J. Maceroni,
Circuit Judge

cc: George Constance
Leland Schmidt